COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016080-12**

Shirley A. Beaudoin	Employee
Michelle Sabino	Employer
Atlantic Charter Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant, and Calliotte)

The case was heard by Administrative Judge Sullivan

APPEARANCES
Nicole M. McDonald, Esq., for the employee
Ana Mari deGaravilla, Esq., for the insurer

HARPIN, J. The employee appeals from a decision awarding her a closed period of total and ongoing partial incapacity benefits. We reverse the award of partial incapacity benefits and recommit the case to a different judge for findings, supported by the evidence, on the extent of incapacity after September 16, 2013.

This sixty-three year old employee was employed in food service work from her high school years to 2003, when she began working full-time as a personal care assistant (PCA), work she had done part-time since 1998. (Dec. 5.) Her work as a PCA required lifting, pulling, and bending in order to assist severely handicapped patients. Id.

On June 26, 2012, the employee suffered an industrial accident while assisting her bedridden employer. She sustained a pull and a sharp knifing pain in her low back, radiating into her left leg and foot. (Dec. 5-6.) She left work at that time, (Dec. 5), and was paid § 34 benefits by the insurer on a without prejudice

basis, from the date of injury to December 14, 2012. (Tr. I, 4.)[1] On April 5, 2013, the employee's condition was diagnosed by the § 11A impartial physician, Dr. Mary L. Lussier, as a chronic lumbar strain with left leg radiculopathy and a degenerative condition in the lumbar spine.[2] (Dec. 9; Ex. 1, 4.) The employee and insurer stipulated, during the course of the employee's testimony, that she was no longer able to perform the physical requirements of her work as a PCA. (Dec. 8; Tr. 55-56.)

The employee first treated with a chiropractor, Dr. Anne Desnoyers-Sylvia, who recommended the employee have an orthopedic examination, which she did with Dr. Harry VonErtfelda. (Dec. 6.) Dr. VonErtfelda provided conservative treatment to the employee up to September 2012, at which time he told her she would probably be able to return to work by the next appointment. (Dec. 6.) "Unhappy with that observation, she did not return to him." Id. The employee then saw Dr. Joseph Doerr, a physiatrist, who performed multiple EMG's, gave a low back injection, provided a back brace for extended walking, ordered water and physical therapy, and, for daily pain, prescribed a TENS unit, muscle relaxers, and Tylenol with codeine. Id. The employee had some relief as a result of these efforts, and was released from active care by Dr. Doerr in March 2013, with a recommendation that she follow up with a pain specialist. She met with the specialist, but decided not to have the further injections offered her. Id.

Dr. Doerr saw the employee on September 16, 2013, and cleared her to return to light duty work, "if available." (Dec. 11; Ex. 9b.) However, on October 17, 2013, the doctor, after examining the employee, stated that her work

[1] The case was tried over three days. "Tr. I" will refer to the first day of hearing, June 6, 2013. "Tr. II" will refer to the second day of hearing, September 18, 2013. "Tr. III" will refer to the third day of hearing, November 20, 2013.

[2] The insurer raised § 1(7A) as an affirmative defense (Insurer's Hearing memorandum, Ex. 4), but was not able to meet its burden of production to provide an offer of proof of the existence of a combination injury. (Dec. 2.)

disposition "[r]emains now none until further workup and treatment." (Dec. 12; Ex. 9b.)

The judge adopted Dr. Doerr's September 16, 2013, opinion that the employee could perform light duty work, "if available," but specifically rejected his October 17, 2013, opinion that the employee had no work capacity until she had had further treatment. (Dec. 11, 12.) Regarding the employee's physical limitations after September 16, 2013, the judge adopted the opinions of Dr. Lussier, Dr. Robert Nicoletta, and Dr. John H. Chaglassian, all of which were given at least six months before Dr. Doerr's light duty opinion. He awarded the employee § 34 benefits from December 15, 2012, to September 16, 2013, and § 35 benefits from September 17, 2013, and continuing, assigning her a $10.00 per hour/ $400.00 per week earning capacity. (Dec. 15.) The employee filed a timely appeal.

The employee raises several arguments in her appeal. She asserts it was arbitrary and capricious for the judge to find her partially incapacitated based on Dr. Doerr's September 16, 2013, treatment note, where he wrote: "Work disposition: Light duty if available," (Ex. 9b), and reject the doctor's next treatment note one month later, on October 17, 2013, where he wrote: "Work capacity: remains now none until further workup and treatment." Id.; (Employee br. 6-7; Ex. 9b.) She argues that the September 2013 opinion is not a sufficient basis on which to make "findings as to lifting, pushing, pulling, standing, reaching, etc.," and that absent a specific definition of "light duty," which the judge himself admitted was not provided by the doctor, the finding of partial incapacity was unwarranted. (Employee br. 4; Dec. 12.) She argues further that the judge erred by basing the medical limitations, which were not supplied by Dr. Doerr, on the limitations given by three other doctors, the latest of which were six months before Dr. Doerr's September 2013 report. We agree.

We have said a number of times that a physician's opinion must be considered as a whole when determining the nature of that opinion. Warman v.

Berkshire Community College, 31 Mass. Workers' Comp. Rep. 117, 125 (2017); Vallee v. Brockton Housing Authority, 31 Mass. Workers' Comp. Rep. 15, 22 (2017). However, a judge may adopt only a part of a doctor's opinions, as long as he specifies what part of the opinion he is adopting. Carpenter's Case, 456 Mass. 436, 444 (2010); Amon's Case, 315 Mass. 210, 214-215 (1943); Reis v. Anchor Motor Freight, 9 Mass. Workers' Comp. Rep. 82, 85 (1995).

Here, the judge had before him two of Dr. Doerr's treatment notes that were one month apart. The two notes were very similar, except that the later note indicated the employee had had "some improvement" due to pool therapy. Despite the parallels in the two notes, and the finding of improvement in the second report, Dr. Doerr came to different conclusions on the extent of incapacity: in the September note, he concluded that the employee could return to light duty, while in the October note he stated that she had no work capacity.[3] Notably, Dr. Doerr did not provide any physical limitations supporting the September opinion

[3] In the first report, dated September 16, 2013, the doctor stated the employee had pain which was "generally worse with prolonged standing more than sitting. It was previously minimally improved with various low dose opioids. Nothing of late." (Ex. 9b.) He also noted she was "[s]till significant for diffuse left leg paresthesias and weakness." Id. Her physical exam showed a slight decreased sensation of the left lateral calf more than her foot, and a decreased left ankle jerk as compared to the right, but no other neurological deficits. The doctor noted the employee was reengaged in pool physical therapy, "and advance as tolerated, core strengthening etc." Id. He concluded with the work disposition of "Light duty if available." Id. In the second report, dated one month later on October 17, 2013, Dr. Doerr noted that "[s]ince last evaluation, she's had some improvement with aquatic therapy moreso than medications." Id. He noted that "Pain remains as above, worse with bending and change of positions and minimally improved with previous methadone." Id. She was "[s]till significant for occasional paresthesias and weakness of left lower extremities with change of position." Id. Her physical examination remained the same, "with slight decreased sensation of the left lateral calf more than [her] foot and decreased ankle jerk. Otherwise, there is no neurologic deficit, reasonably good strength and functional range of motion of all distal pivots." Id. He noted that his "[w]orking diagnosis shifts slightly to proximal sciatic entrapment and therefore she is injected with 3 cc Marcaine to above trigger point. . . " Id. He concluded with finding the employee's work disposition: "[r]emains now none until further workup and treatment." Id.

on light duty. The judge himself acknowledged that, because Dr. Doerr did not provide specific limitations on which he based his determination that the employee could perform light duty, the judge would supply those limitations by looking to three other doctors' opinions, those of Dr. Lussier, Dr. Chaglassian and Dr. Nicoletta. (Dec. 12.)

We hold that the judge erred in basing his findings of the employee's physical limitations, as of September 17, 2013, on the limitations given by Drs. Lussier, Chaglassian, and Nicoletta, the latest of which were six months before Dr. Doerr's September 2013 report.

The impartial physician, Dr. Lussier, found the employee to be partially medically disabled as of her examination on April 5, 2013, with physical limitations of no lifting, carrying, bending, pushing or pulling, and a requirement of being able to change her position from sitting every twenty to thirty minutes.[4] (Dec. 9; Ex. 1, 4.) Dr. Chaglassian, an IME doctor for the insurer, found, on February 21, 2013, that the employee was capable of a sedentary job "which is modified light duty," with limitations of standing, sitting, and walking as tolerated, as long as she avoided repetitive bending, lifting no more than ten pounds, pushing, pulling twisting and direct patient care. (Dec. 11; Ex. 10d.) The judge adopted the limitations from these two doctors. (Dec. 9, 11, 12.) The judge also stated he adopted the October 27, 2012, opinion of the first IME physician, Dr. Robert Nicoletta, that the employee had limitations of light duty, with no bending, turning, twisting, pushing, pulling or any lifting greater than five or ten pounds. (Dec. 12; Ex. 9c.)

The judge's explanation for coupling the three doctors' opinions on physical limitations with Dr. Doerr's September 13, 2013, light duty opinion was that,

[4] The judge found Dr. Lussier's report to be inadequate on the issue of the extent of disability, thus making that part of her opinion not *prima facie* evidence, and allowing further medical evidence on that issue. (Dec. 2, 9; Tr. I, 127.)

> It was the effective date of [her] return to work that was at the essence of this case. I find that Dr. Nicoletta, Dr. Chaglassian and Dr. Lussier set-out [sic] those limitations which were to become effective at some later date. That effective date was established by the opinion of Dr. Doerr.

(Dec. 12.)

It is acceptable for a judge to adopt part of a physician's opinion, and even acceptable to craft a finding of medical disability by putting several medical opinions together. Carpenter's Case, supra. However, it is not in accordance with applicable law to impose limitations, given by the doctors at a time when they found the employee to be partially disabled, onto a subsequent doctor's opinion of light duty capacity. In the present case, each of the physicians, whose opinion on physical limitations was adopted by the judge, also felt that the employee could return to work in some capacity *on the date that they wrote their reports*. Yet the judge made the explicit finding that the employee was totally disabled on each of those dates: "I find the lumbar spine injury that Ms. Beaudoin suffered resulted in a total loss of earning capacity from June 27, 2012 through September 16, 2013." (Dec. 14.) His error was in finding that the three doctors' limitations "were to become effective at some later date." (Dec. 12). The doctors placed no such restriction on the effective date of their opinions. Each found the employee to be partially medically disabled with the limitations in effect on the date of their separate opinions.

The judge's adoption of physical restrictions contained in three physicians' opinions, each of whom found the employee to be partially disabled six months or more before the judge found her to be so, was therefore inconsistent with his finding that the employee was totally disabled at the time of their opinions. This inconsistency is the bellwether of arbitrary findings. Connerty v. MCI Bridgewater, 31 Mass. Workers' Comp. Rep. __ (August 23, 2017)(adoption of parts of different medical opinions that cannot be reconciled makes resulting decision arbitrary and capricious). For this reason the decision must be

recommitted for further findings on the extent of the employee's incapacity after September 16, 2013.

Finally, the employee challenges the $400.00 per week earning capacity. Because the new judge must make findings regarding the employee's physical limitations as of September 17, 2013, the judge must also make new findings regarding the employee's earning capacity, if any.[5]

Because the administrative judge is no longer with the department, recommittal to a new judge will be required. The new judge may review all testimony, take new testimony if he or she deems it necessary, and admit further medical evidence covering the period after the close of the record. The judge is to determine the extent of the employee's incapacity and the date of the onset of any change in that incapacity.[6] Because the insurer did not appeal it cannot obtain a better result than accorded it in the decision, McGahee v. Milton Bradley, 25 Mass. Workers' Comp. Rep. 329, 330 (2011); thus the judge cannot find the employee partially disabled before September 17, 2013, even if new findings would support an earlier date. The finding of total incapacity from June 27, 2012, to September 16, 2013, is therefore affirmed. We refer this case to the senior judge for re-assignment.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). If such fee is sought,

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[5] We take judicial notice of the fact that the minimum wage was $8.00 per hour in 2013. Thus, the $400.00 per week earning capacity assigned by the judge, based on a 40-hour workweek, was not a minimum wage earning capacity. Any findings above minimum wage must be supported by a "factual source or reasoned explanation." Dalbec's Case, 69 Mass. App. Ct. 306, 316 (2007).

[6] The employee also contends that none of the medical opinions supported a finding of partial incapacity, and the finding that the employee could work full time was not supported by the evidence. As we are recommitting the case for new findings, based on the evidence, as to the extent of the employee's incapacity after September 16 2013, the new judge will be free to make their own decision on medical and vocational issues.

employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **March 28, 2018**